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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SUSAN DAVID et al., Plaintiffs and Respondents, v. WENDY ALTER HERMANN, Defendant and Appellant.	A119365 (Marin County Super. Ct. No. PRO 000851)

This case is a dispute between sisters Susan David and Wendy Alter Hermann concerning the living trust of their mother, Jane Alter, who died in 1997. In a prior appeal, we affirmed a judgment adjudicating the trust and a trust amendment invalid on the grounds of undue influence and fraud on the part of Hermann. (*David v. Hermann* (2005) 129 Cal.App.4th 672, 676, 679-680.) David thereafter petitioned to require Hermann to account for her administration of the Jane Alter trust as constructive trustee, and to recover assets of the constructive trust. Hermann rendered an accounting and petitioned for its approval. Orders were entered culminating in an "Order After Post-Judgment Hearing" filed on July 20, 2007, from which Hermann appeals. We reverse this order, and an order filed on March 9, 2007, and remand for preparation of a statement of decision for these orders.

I. BACKGROUND

David's November 2005 Probate Code section 850 petition sought an accounting from Hermann for her administration of the Jane Alter trust from June 8, 1993 through

October 31, 2005. The petition as amended sought to recover Hermann's interests, obtained with trust assets, in a residence in Petaluma, and an office building at 300 Brannan Street in San Francisco. In October 2005, Hermann filed a petition to probate Jane Alter's 1991 will in San Francisco Superior Court; David filed a will contest in that matter. In opposition to Hermann's unsuccessful attempt to have the case at bench coordinated with the San Francisco probate proceeding, David argued that there was "no factual or legal basis for transferring administration of the post-judgment accounting to the San Francisco Probate Court. There is no danger of inconsistent rulings or of a multiplicity of actions concerning the accounting that is now months overdue. Indeed, forcing the preparation of the court-ordered accounting in Marin could only serve to expedite the San Francisco probate proceeding. If the San Francisco Superior Court determines that the 1991 will governs the distribution of Jane Alter's probate estate, the exact nature and extent of that probate estate will have already been determined by virtue of the accounting."

The court granted the petition for an accounting, and ordered briefing on the other issues raised in the petition. In her opening brief on those issues, Hermann argued that the assets she held as constructive trustee "are decedent Jane Alter's" assets, and that she should be instructed to transfer those assets to Debra Dolch, the special administrator of the estate of Jane Alter in San Francisco Probate Court. David opposed that approach, noting that an order in the San Francisco probate case had stated that ownership interests in the Petaluma property were issues pending in the case at bench.

By stipulation of the parties, Dolch was appointed receiver of the Petaluma and Brannan Street properties; Hermann quitclaimed title to the Petaluma property, and a 25 percent interest in the Brannan Street property, to Dolch as receiver.

Hermann filed an accounting, petitioned to have the accounting approved, and requested that the case be transferred to the San Francisco Probate Court "so that the assets may be distributed according to Jane Alter's testamentary disposition subject to probate." David objected to the accounting, calling it inadequate and incomplete. David retained Charlene Haught Johnson, a probate attorney, to review the accounting; Johnson

concluded that Hermann owed the constructive trust $1,889,870. Johnson opined that the constructive trust assets included this $1,889,870 "receivable" from Hermann, equity in the Petaluma property, and a 25 percent interest in the 300 Company partnership, which collected income from the Brannan Street property. Johnson's report stated that Hermann was entitled to 50 percent of the trust assets; David or David's children were entitled to the other 50 percent. Johnson opined that Hermann's share of the trust assets "should first be satisfied out of her receivable[]."

In November 2006, the court rendered its decision on the accounting and determined that Hermann would be surcharged for: attorney fees of "$93,378 plus margin fees in the sum of $16,223 paid on loans Ms. Hermann borrowed for attorneys' fees to defend herself against the charges of undue influence and fraud"; $24,000 of the $65,000 in trustee fees claimed; $1,120,712.67 in distributions from trust assets; and $69,349.86 from refinancing of the Petaluma property. The court found that Hermann owed interest at the rate of 10 percent per annum from the dates of the disapproved payments or disbursements. The court wrote: "All other requests for settlement and approval are granted and all other objections by the parties are denied."

The parties disagreed on the amount of Hermann's liability under the November 2006 decision. David argued that Hermann owed the trust $2,029,328.75 as of October 4, 2006; Hermann argued that, as of that date, she owed the trust $1,296,228. In a December 2006 brief, David continued to oppose transferring the case to San Francisco Probate Court for a distribution of assets. David submitted that, "[i]n view of the dispute over whether the constructive trust assets are assets of Jane Alter's probate estate," it would be "premature" for the court to make such an order.

The matter was set for a further hearing on January 17, 2007. The judge hearing the case retired on January 5, 2007, and another judge thereafter presided. David filed a proposed judgment imposing a $2,029,328.75 surcharge on Hermann as of October 4, 2006, increasing by $362.64 per day thereafter (referred to in the proposed judgment as the "Hermann Receivable"), and authorizing Dolch to obtain an appraisal of the

constructive trust's "25% interest in the 300 Brannan real estate and partnership," part of the constructive trust "Estate." The proposed judgment provided:

"The parties all appear to agree that Hermann is probably entitled to 50% of the value of the Estate. If Hermann is determined by this Court or by the San Francisco Superior Court to be entitled to 50% of the Estate, and if said 50% share of the Estate is equal to or greater to the Hermann Receivable, the Hermann Receivable shall be applied to Hermann's 50% share of the Estate and Hermann shall receive the balance . . . . If the value of Hermann's share of the Value of the Estate is less than the value of the Hermann Receivable on the date of distribution to Hermann, Hermann will owe the balance to the persons entitled to receive the remaining balance of the Value of the Estate. . . . To the extent that Hermann's interest in the constructive trust does not fully reimburse the constructive trust, a money judgment against Hermann for any deficiency shall issue for the balance."

In an order filed January 19, 2007, the court found "various anomalies and inconsistencies in the proposals of Ms. Hermann that are difficult to reconcile with the thrust of this court's prior order of November 20, 2006. The court is persuaded that [David's] motion and proposed judgment is more in keeping with the intent and the history of this litigation and that order. Petitioner Susan David's motion for entry of judgment is granted, not as an entry of judgment, but as an interim order." The order stated that David's proposed judgment "shall be issued as an order of the court," with only the title, and the hearing and briefing schedule, modified.

The contemplated order had not been filed by the time of the next hearing, on March 9, 2007. At the March 9 hearing, Hermann requested a statement of decision with respect to the order, and filed a "Supplemental Request for Statement of Decision" later that day. Hermann asked among other things that the court "address how this March 2007 order justifies imposing a surcharge greater than the amount included in Judge Smith's November 20, 2006 order, assuming the Court in this March 9, 2007 order refuses to take into account the credits approved in the November 20, 2006 order."

Hermann stated that the request for statement of decision would be withdrawn if the March 2007 order remained an "interim," rather than final, order.

The court filed an order on March 9, 2007, incorporating the provisions of David's proposed judgment with minor modifications, such as changing the word "judgment" to "order," and the date of the next hearing from April 6, 2007 to May 7, 2007. The order "adjudged and decreed": "1. Respondent Wendy Hermann ("Hermann") is surcharged the sum of $2,029,328.75, as of October 4, 2006 . . . increased by additional interest at the rate of $362.64 per day . . . . [¶] 2. The constructive trust estate is herby declared to consist of the following: [¶] . . . [¶] c. The amounts specified in paragraph 1 of this order as constituting surcharges against Hermann, and the accrued interest thereon until Hermann satisfies said amounts . . . ." The court did not issue a statement of decision.

In her opening brief on the remaining issues, Hermann objected to the court's decision to rule on disposition of the constructive trusts assets, and reiterated her longstanding argument that the court was required to transfer all of those assets to the San Francisco Probate Court with jurisdiction over the estate of Jane Alter. In her opening brief, David dropped her longstanding opposition to that argument, and "acquiesce[d] to and join[ed] in Hermann's request that this Court determine that the personal representative of the Estate of Jane Alter, to be appointed by the San Francisco Superior Court, should receive the assets of the constructive trust estate that have been determined pursuant to this Court's March 9 Order."

David filed an appraisal from attorney Joseph Stemach valuing the constructive trust's 25 percent interest in the 300 Company partnership, "which includes the 300 Brannan Street real property," at $1,191,000, based on a 2005 appraisal of the real property. Hermann objected that the Brannon Street real property was not owned by the partnership. Hermann argued that it would be premature and improper for constructive trust assets to be appraised in the case at bench because the value of the assets had to be determined at the time of their distribution in the San Francisco probate case. Dolch submitted an updated appraisal of the Brannon Street real property, which caused

Stemach to increase his valuation of the constructive trust's 25 percent partnership interest to $1,401,801.

At the May 7 hearing, the judge said he thought it would be inappropriate for him to pass on the merits of Stemach's appraisal because his wife had worked with Stemach. Hermann did not consent to have the court rule on the matter, and reiterated her argument that any valuation of trust assets would be premature in any event. The hearing proceeded on the issue of whether the 300 Company partnership owned the Brannon Street real property. David introduced documentary exhibits and served a trial brief aimed at overcoming the presumption that the owner of legal title is the owner of full beneficial title (Evid. Code, § 662 [presumption may be rebutted by clear and convincing proof]). The court granted Hermann's request for further briefing on the issue, directed Hermann to file her brief by May 21, 2007, and directed David to file her reply brief by May 29, 2007. Dolch's counsel asked "that whatever final order comes from this court . . . have a list of the assets in the constructive trust so that if Ms. Dolch is appointed in the San Francisco court, she knows what those assets are."

Minutes for the May 7, 2007 hearing in the court's register of actions state, "case under submission," but a May 11, 2007 entry in the register states, "case no longer under submission."

In her posthearing brief, Hermann argued that, given "David's concession that those assets held by the Receiver should be delivered to the personal representative of the Estate of Jane Alter, this Court should simply order the Receiver to deliver those assets to the Probate Court . . . ."

David filed a proposed order stating in part: "2. The Court finds that the constructive trust estate consists of the following: [¶] a. A 25% interest in the 300 Company Partnership, which partnership interest includes the 25% interest in the real property located at 300 Brannan Street, San Francisco of which record title is in the name of the Receiver. [¶] b. Hermann's surcharge, as determined by this Court's March 9, 2007 Order, in the amount of $2,029,328.75, as of October 4, 2006. This surcharge shall be increased by additional interest . . . . [¶] c. Hermann is further surcharged the sum of

$30,847 for costs of the receivership . . . plus interest . . . . [¶] d. The foregoing surcharges and interest are money judgments against Hermann. . . ." The proposed order concluded: "Except to the extent the March 9, 2007 Order is inconsistent with the foregoing, the March 9, 2007 Order is hereby incorporated by this reference into this Order, which is a final order of this Court."

In response to Hermann's objections to the proposed order, David stated that she "does not contend that the March 9, 2007 Order is final. Such contention would be inconsistent with this Court's order of January 19, 2007 which declared the March 9, 2007 Order would be 'interim.' The Court clearly reserved jurisdiction to modify that order. David proposes that this Court now confirm those portions of the March 9, 2007 Order that will become part of the final order of this Court. If this Court fails to do so, there can be little doubt that Hermann will urge the San Francisco Probate Court to disregard portions of the March 9, 2007 Order not to her liking and David will be forced to relitigate issues that have already been litigated and relitigated *ad nauseum* in this Court."

On May 29, 2007, the last day for filing David's reply brief, Hermann filed a "Supplemental Request for Statement of Decision." The May 29, 2007 request renewed the requests for statement of decision made on March 9, 2007, and sought a statement of decision on a number of issues incident to the ownership of the Brannon Street real property, including: "When was this real property inherited by Zal Alter [the parties' father] and Renee Delman 'converted' from ordinary individually owned property to 'partnership' property; by whom was the real property contributed; when was it accepted by the 'partnership.' Who were the 'partners' when this alleged conversion took place; who are the 'partners' today? Has Renee Delman, the only survivor of the 1966 written [partnership] agreement, been provided proper notice of this allegation that property excluded from her agreement and identified as owned by trusts of which she is a trustee should be characterized as 'partnership' property. How does the Court construe paragraph 6 of the 1966 agreement between decedent Zal Alter and his sister Renee Delman which expressly excludes any real property from being 'partnership' property."

David prepared a proposed statement of decision, which, as Hermann pointed out, did not address any of the foregoing issues.[1]

The court filed its Order After Postjudgment Hearing on July 20, 2007. As to the subject matter of the May 7 hearing, the court found "that the 25% interest in the Brannan Street real property, held by receiver Debra Dolch, is included in the 25% interest in the 300 Brannan Company Partnership, listed by respondent Hermann in her accounting of constructive trust estate assets. . . . Petitioner David has submitted 'clear and convincing evidence' to rebut the presumption set forth in Evidence Code § 662. . . ."

With respect to the requests for statements of decision, the court wrote: "Respondent Hermann's March 9, 2007 Request for Statement of Decision is moot by its own terms, because the January 19, 2007 order is an interim order. Respondent Hermann's May 29, 2007 'Supplemental' Request for Statement of Decision is moot insofar as it relates to the March 9, 2007 request. The [May] 29, 2007 'Supplemental' Request is untimely insofar as it relates to the May 7, 2007 hearing, because it was not made 'prior to the submission of the matter for decision.' CCP § 632."

As for the March 9 order, the court did not reiterate the prior rulings at length as David had proposed. Instead, the court wrote simply: "As per their prior agreement, the parties are direct[ed] to the Probate Court in San Francisco for further evaluation in accordance with the rulings heretofore made, and, in particular, this Court's order of March 9, 2007. The assets of the constructive trust estate are described in the March 9, 2007 [order]."

II. DISCUSSION

Code of Civil Procedure section 632 provides in pertinent part that "upon the trial of a question of fact by the court," the court "shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless

[1] We note also that none of these issues are addressed in David's appellate brief.

the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision." California Rules of Court, rule 2.900 provides in relevant part:
"(a) Submission [¶] A cause is deemed submitted in a trial court when either of the following first occurs: [¶] (1) The date the court orders the matter submitted; or [¶] (2) The date the final paper is required to be filed or the date argument is heard, whichever is later. [¶] (b) Vacating submission [¶] The court may vacate submission only by issuing an order served on the parties stating reasons constituting good cause and providing for resubmission."

"The primary purpose of a statement of decision is to facilitate appellate review." (*People v. Landlords Professional Services, Inc.* (1986) 178 Cal.App.3d 68, 70.) The statement of decision also serves to identify the issues that were adjudicated. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2008) ¶ 16:99, p. 16-22 (rev. #1, 2002).) "If a statement of decision is timely requested and not waived, the trial court must render a statement of decision and it is reversible error if it does not do so." (*Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530-1531; see *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1397 [failure to provide statement of decision when properly requested is "reversible per se" error]; *Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 165 [same] (*Gordon*).)

The basis for the trial court's conclusion that no statement of decision was required as to findings in the order of March 9, 2007 is unclear. The March 9, 2007 order was entered as an "interim order," which became final to the extent that it was reaffirmed in the order of July 20, 2007. Hermann timely requested a statement of decision as to those findings on March 9, 2007, and renewed that request on May 29, 2007, before they became final. The court stated that the March 9, 2007 request was "moot" because the January 19, 2007 order was an interim order; however, that request did not relate to the January 19 order, it related to the further order contemplated at the March 9 hearing. The court stated that the May 29 supplemental request was moot insofar as it related to the March 9 request, but, again, the March 9 request did not relate to the January order, it

related to the March 9 order. It is not apparent what more Hermann could have done to request a statement of decision as to findings that were made on March 9 and finalized on July 20.

A statement of decision as to the findings made in March and finalized in July would serve to clarify what was decided. The March request for a statement of decision focused on the amount of the surcharge against Hermann. It appears that the court may have intended to resolve this question, but the point is not entirely clear. On the one hand, the July order did not incorporate detailed findings from the March order as David urged, and did not specifically refer to the amount of the surcharge. Moreover, the July order was silent as to whether the surcharge included the costs of Dolch's receivership, an issue that arose after the March order was entered. On the other hand, the July order stated that the assets of the constructive trust estate were those described in the March order. The March order identified the amount of the surcharge, and then included "Hermann's obligations for surcharges and interest as set forth above" among the assets of the constructive trust. The language of the orders, taken together, could be interpreted as a decision on the amount of the surcharge (and an implicit rejection of David's argument that the surcharge should include the receivership costs). However, David eventually agreed, when the court declared a conflict with respect to the partnership appraisal, that the San Francisco Probate Court could determine valuation issues with respect to the constructive trust. In view of that concession, the trial court may have decided, in the end, to leave valuation of the surcharge to the San Francisco Probate Court. If that is the reason why Hermann's requests for a statement of decision as to the surcharge were deemed to be moot, the court on remand can so indicate.[2]

[2] David has asked us to take judicial notice of an order filed on October 31, 2008, in the San Francisco probate case approving Dolch's Second Report and Account, and related pleadings in that case. David argues that this order has conclusively determined the amount of the surcharge, making that issue moot for purposes of this appeal. We grant the request for judicial notice (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a)), but reject the argument that the amount of the surcharge has been resolved in the probate court. As shown in paragraph 4.A. of Dolch's response to Hermann's objections to the

The court found that the May 29 request for a statement of decision on the Brannon Street ownership issue was untimely because it was not made before the matter was submitted for decision at the May 7 hearing. However, the court never unequivocally stated at the hearing that the issue was in fact submitted. The court said, "I'll take it under submission . . . I suppose," and then said, "It's under submission . . . I guess," and then asked, "Can I take the matter under submission now?" On this record, Hermann did not have "fair warning to request the statement, if desired, before the case was [deemed] submitted for decision" on May 7. (*Gordon, supra*, 179 Cal.App.3d at p. 166.) The docket shows that, as of May 11, the court itself did not consider the matter to be under submission. The request for statement of decision was therefore timely under Code of Civil Procedure section 632. (Cal. Rules of Court, rule 2.900(a)(2) [where matter is not ordered submitted, submission occurs when final brief is due].)

David contends that statements of decision were not required as to the orders because they were rulings on postjudgment law and motion matters. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294 [statement of decision is generally not required for decision on a motion]; *In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040 [Code Civ. Proc., § 632 generally applies "when there has been a trial followed by a judgment"].) However, no authority purports to exempt all postjudgment proceedings from the requirements of Code of Civil Procedure section 632, and there is nothing unusual about requesting statements of decision on property disputes, like those here, that are resolved by means of Probate Code section 850 petitions. "Experienced practitioners usually will request a statement of decision for important matters that turn on contested facts and that do not lie within the trial court's discretion—that is, for matters that feel like an ordinary civil trial (i.e., will contests or Prob C § 850 property disputes)." (2 Cal.

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report and account, the amount of the surcharge listed in the report and account merely reflected Dolch's interpretation of what was decided in the case before us. Since Dolch's report and account did not purport to address the merits of the parties' arguments on the amount of the surcharge, the order approving the report and account cannot be construed to have resolved those arguments. Hermann's request for an award of costs incurred in opposing the request for judicial notice is denied.

Trust and Probate Litigation (Cont.Ed.Bar 2009) Trust and Probate Litigation, § 23.5, p. 810.)

David contends that statements of decision were not required for the orders because they did not result from trials of questions of fact. However, the amount of Hermann's surcharge and the ownership of the Brannan Street real property were factual issues. (See 1 Trust and Probate Litigation (Cont.Ed.Bar 2009) Accountings and Surcharge, § 13.57, p. 439 [matters of accounting and surcharge typically involve disputed factual issues]; *Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 472-473 [discussing evidentiary issues pertaining to surcharge of estate administrator]; *Pluth v. Smith* (1962) 205 Cal.App.2d 818, 826 ["[w]hether or not real property standing in the names of individual partners is partnership property is a question of fact"].)

III. DISPOSITION

The orders of March 9, 2007, and July 20, 2007, are reversed, and the case is remanded with directions to prepare a statement of decision for those orders.[3]

_____
Marchiano, P. J.

We concur:

_____
Margulies, J.

_____
Graham, J.*

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* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[3] In so holding, we express no opinion as to the court's conclusions on the merits.